IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1978

NO: 78-1305

Danny P. Blea, Petitioner

-vs-

State of New Mexico

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE
STATE OF NEW MEXICO

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

DANNY P. BLEA, the Petitioner herein, prays that a Writ of Certiorari issue to

review the judgment and opinion of the New Mexico Court of Appeals in State -vs- Blea, Court of Appeals No. 3669, entered on October 10, 1978, and the decision of the Supreme Court of the State of New Mexico denying a Petition for Writ of Certiorari in Blea -vs- State, Supreme Court No. 12,250, entered on November 22, 1978.

OPINIONS BELOW

The opinion of the New Mexico Court of Appeals is unofficially reported in the New Mexico State Bar Bulletin N.M.S.B.B. Vol. 17 No.49 and is printed in Appendix A hereto, infra, page 2948 . The Order of the New Mexico Supreme Court denying Petitioner's Petition for Writ of Certiorari is printed in Appendix A hereto, infra, page 31-32 . The Judgment and Sentence

of the New Mexico District Court for the Second Judicial District is printed in Appendix A hereto, infra, pages 33-35.

JURISDICTION

The decision of the New Mexico Court of Appeals was entered on October 10, 1978. A timely Petition for Writ of Certiorari was denied by the New Mexico Supreme Court on November 22, 1978. The jurisdiction of the Supreme Court of the United States is invoked under 28 USC §1257 (3).

QUESTION PRESENTED

Whether the fact that some persons present on the premises where a lawful search pursuant to a warrant is taking place sometimes carry weapons is sufficient to justify the search of a person arriving on the premises during the

search and the clothing of that person left in his vehicle after he exited the vehicle pursuant to police order, where the police have no warrant authorizing the search of persons arriving on the premises.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States which provide as follows:

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirma-

tion, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

This is a criminal case brought by the State of New Mexico. The Defendant,

Petitioner herein, was convicted of trafficking in heroin following a jury trial in Bernalillo County, New Mexico, Cause Number 30257 on May 11, 1978. Prior to trial the Petitioner herein filed a Motion to Suppress the heroin found at the scene on the grounds that the heroin was the fruit of an unconstitutional search and seizure by the police.

The hearing on the Motion to Suppress showed that on January 20, 1978, the Petitioner drove his pickup truck onto the premises of 211 Abajo S.W. in Albuquerque, New Mexico while those premises were being searched pursuant to a legal search warrant.

As Petitioner drove his pickup truck into the driveway and parked near the rear of the driveway, he observed several men in plain clothes approached

the truck. As the men approached, the Petitioner took a tin foil packet, containing heroin, out of his pocket and placed it into the sleeve of a jacket which was lying on the seat of the pick-up truck next to him. The men identified themselves as police officers and immediately ordered the Petitioner out of the pickup truck. One of the police officers escorted the Petitioner to the rear of his vehicle and patted him down for weapons. The officer conducting the frisk noticed a bulge in the Petitioner's pants pocket and found therein approximately Two Hundred and Seventy-Seven Dollars ($277.00) in cash. The Petitioner stated that he had just cashed his pay check and that the stub from that check was in the truck. Apparently, the Petitioner was allowed to go to the cab of the truck and get the pay check

stub from the visor on the drivers side in order to show it to the police officer.

At this point a conflict in the testimony developed as to when and how the packet of heroin, which the Petitioner had previously placed in the sleeve of his jacket which was left lying on the seat of the pickup truck, was found. Two of the arresting officers claimed to have seen the tin foil packet drop from the Petitioner's person as he was first ordered out of the vehicle. The Petitioner, and a person living next door to the premises being searched, testified that while the Petitioner was being frisked and interrogated, one of the police officers took Petitioner's jacket from the front seat of the truck and searched it, and that the tin foil packet, containing heroin, fell to the

ground whereupon it was observed by another police officer and picked up by him at this time. Two other officers who were involved with frisking and questioning the Petitioner testified that they did not see exactly when or how the heroin was found.

The trial court denied the Petitioner's Motion to Suppress and filed Findings of Fact and Conclusions of Law.

The trial court's Finding of Fact and Conclusions of Law are reproduced in Appendix B, hereto, infra, page 37-42. Findings of Fact Number Thirteen states:

> "Either when Blea exited the vehicle, or while the officers were searching the jacket, the tin foil containing the heroin fell on the ground."

The Petitioner had requested the Court to make a specific finding as to whether the heroin was recovered as a

result of it falling to the ground when Petitioner exited his vehicle or whether the heroin was recovered as a result of the police officer searching Petitioner's jacket. The trial court refused to make either of the requested findings.

Following his trial by jury the Petitioner appealed his conviction and sentence to the New Mexico Court of Appeals, alleging that the heroin which Petitioner was convicted of possessing was discovered as the result of an illegal search and seizure.

The New Mexico Court of Appeals affirmed the conviction in its' opinion filed on October 10, 1978 which is reprinted in Appendix A, hereto, infra, pages 18-30 . The Petitioner herein filed a Petition for a Writ of Certiorari in the New Mexico Supreme Court seeking a review of the decision of the New Mexico Court of Appeals. The New Mexico

Supreme Court entered its' Order denying the Petition for Writ of Certiorari on November 22, 1978.

REASONS FOR GRANTING WRIT

The decision of the New Mexico Court of Appeals in the instant case is in conflict with the decision of the United States Supreme Court in Terry -vs- Ohio, 392, US 1, 88 S Ct 1868, 20 Lawyer's Edition, 2nd 889 (1968), if the heroin was obtained by the police as a result of the search of the jacket removed from Petitioner's vehicle. See also: Canal Zone -vs- Bender, 573 F.2d 1328 (5th Cir., 1978). Sibron -vs- New York, 392 US 40, 88 S Ct 1889, 20 Lawyer's Edition 2nd 987 (1968).

The search of Petitioner's jacket was an unreasonable and unlawful search because it exceeded the scope of any reasonable "stop and frisk" as authorized

by the United States Court in Terry -vs- Ohio, supra. In Terry -vs- Ohio, supra., the United States Supreme Court had held that it was lawful for the police to stop an individual and question that individual if they had a reasonable suspicion that the individual was engaged or was about to be engaged in some criminal activity. However, this reasonable suspicion must be based upon identifiable facts which can be articulated to the Court by the police officer. Similarly the police were authorized to frisk or pat down an individual for weapons if they have a reasonable suspicion that the individual was armed. Again, the reasonable suspicion must be based upon facts which can be articulated to the court by the police officer. In the instant case, the testimony of all of the witnesses was that the Petitioner was taken to the rear of his vehicle imme-

diately upon his exiting the vehicle and patted down for weapons. This frisk resulted in the police finding cash in the approximate amount of Two Hundred and Seventy-Seven Dollars ($277.00) on his person. In order to explain his possession of that cash the Petitioner was apparently allowed to return to the front of the pickup truck and reach inside and remove therefrom a check stub showing that he had had a check for that amount of money. The jacket, which was later removed from the pickup truck and searched by the police officers, was not worn by the Petitioner and the Petitioner was outside of his pickup truck while the jacket remained inside of the pickup truck. The Court of Appeals attempts to justify the removal of Petitioner's jacket from the pickup truck and its search by saying that it was "within grabbing range" of

the Petitioner after he had exited his vehicle. There was, however, nothing in either of the conduct of the Petitioner nor in the conduct of the police officers which would indicate that the police officers reasonably believed that the jacket contained a weapon which could be used against them. The removal of Petitioner's jacket from the truck and its search clearly exceeded the authority of the police to frisk the Petitioner for weapons. If the heroin fell to the ground as a result of the police removal of the jacket from the truck, then the heroin was illegally seized and obtained by the police officers since they did not have a valid search warrant to search the Petitioner's truck nor were there any exigent circumstances which would authorize the police to search the truck in the absence of a valid search warrant.

Jones -vs- U.S., 24 Cr L. 2026, decided September 18, 1978 by the D. C. Court of Appeals, published on October 11, 1978, one day after the decision by the New Mexico Court of Appeals was filed in the instant appeal, further defines Pennsylvania -vs- Mimms, 434 US 106 98 S Ct 1330, 54 L.Ed 2d 331 (1977), the case relied upon by the State as its authority for ordering the Petitioner from his automobile when he arrived at the scene of the execution of the search warrant at 211 Abajo Southwest.

Jones, supra., holds that an officer must be "able to point to specific and articulable facts" in order to justify an intrusion, citing Terry -vs- Ohio, 392 US 1, 88 S Ct 1898, 20 L.Ed 2d 889 (1968). In the instant case the officers stated that people who arrived at the scene of a search were "sometimes" armed to justify ordering him out of the truck.

The Court of Appeals held that the search of the jacket was then justified because it was within "grabbing" range and might contain a weapon. Under Jones, supra., both ordering the Petitioner from his truck (although Petitioner did not raise this issue on appeal) and the search of the jacket was not the results of any "specific or articulable facts" known to the officers, and any search of the jacket was illegal.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

OPINIONS BELOW

IN THE COURT OF APPEALS

OF THE

STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff, Appellee,

-vs- NO: 3669

DANNY P. BLEA,

Defendant, Appellant.

APPEAL FROM THE DISTRICT COURT

OF BERNALILLO COUNTY

COLE, JUDGE

TONEY ANAYA, Attorney General
JAMES F. BLACKMER, Assistant Attorney General
Santa Fe, New Mexico

Attorneys for Appellee

VINCE D'ANGELO
Albuquerque, New Mexico

Attorney for Appellant

O_P_I_N_I_O_N

WOOD, Chief Judge

Defendant appeals his conviction for trafficking in heroin. He asserts that, at trial, there was not a sufficient foundation for testimony about a narcotics sniffing dog. The claim is frivolous. Defendant never informed the trial court as to what "foundation" was lacking and did not, on cross-examination, attempt to attack the propriety of the testimony that the dog was "trained for sniffing out narcotics, specifically heroin." See Dahl v Turner, 80 NM 564, 458 P.2d 816, 39 A.L.R. 3d 207 (Ct. App. 1969). In addition, testimony concerning use of the dog went to the absence of heroin in the area where it was found after defendant arrived on the scene. Several witnesses testified to this absence. Even if there was an insufficient

foundation concerning the dog's qualifications, the use of the dog testimony did not harm defendant because cumulative of other testimony. See State v. Brown, 91 N.M. 320, 573 P.2d 675 (Ct.App. 1977). The issue for discussion concerns the trial court's refusal to suppress the heroin at a pretrial motion hearing.

Officers were at a residence searching for heroin pursuant to a search warrant. Defendant drove onto the premises and parked his pickup truck near the rear of the residence. Four officers immediately approached the pickup. Defendant was told to get out of his vehicle and did so. He was patted down for weapons. There is no issue as to the propriety of the officers detaining defendant until the search, pursuant to the warrant, was concluded. State v. Valdez, 91 N.M. 567, 577 P.2d 465 (Ct.App. 1978). There is no issue concerning the propriety of requiring de-

fendant to exit his vehicle or concerning the propriety of frisking defendant for weapons. The evidence is uncontradicted that persons coming upon the scene of a heroin search are often armed and often will attempt to leave the scene, using their vehicle "for a fast getaway". See Pennsylvania v. Mimms, ____U.S. _____, 54 L.Ed.2d 331, 98 S.Ct. 330 (1977).

The search and seizure issue arises because of a conflict in the evidence as to how the heroin was found. The State's theory, supported by testimony of officers, is that the heroin fell to the ground as defendant's testimony, is that when he saw the officers approaching he placed the packet of heroin in the sleeve of his jacket, which was lying on the seat of the pickup. According to defendant, after he was frisked, an officer reached into the pickup, took his jacket and searched it. Defendant testified the officer "kept jiggling the

jacket around, the heroin must have kept sliding slowly down the sleeve, cause its a real thick leather jacket, and it fell out, and he didn't see it, and he patted the--and then he went and threw the jacket back in the truck or on top of the hood." This is the only evidence at the suppression hearing as to the nature of the "search" of the jacket. According to defendant, the heroin was discovered on the ground, after the jacket "search".

The trial court found:

> 13. Either when Blea exited the vehicle, or while the officer was searching the jacket, the tinfoil containing the heroin fell the [sic] the ground.

Defendant recognizes that if the heroin fell to the ground when he exited his vehicle, the seizure of the heroin was proper. State v. Everidge, 77 N.M. 505, 424 P.2d 787 (1967);

State v. Garcia, 76 N.M. 171, 413 P.2d 210 (1966). Defendant states:

> On the other hand, if the packet of heroin fell to the ground as a result of the police officers [sic] search of Defendant's jacket, then the evidence must be suppressed. Police had no right, either to remove Defendant's jacket from the cab of the pick-up truck, or to search it once it had been removed . . . . Consequently, the seizure of the heroin would be inadmissible as fruit of the poisoned tree.

Defendant contends he is entitled to a specific finding as to when the heroin fell to the ground. This contention does not involve a question of whether the trial court was required to make findings in connection with the motion to suppress. Rule of Crim. Proc. 33 does not require findings in connection with a pretrial motion. Compare Rules of Crim. Proc. 38(c). Defendant claims that since the trial court made findings, he is entitled to more

than the either/or findings of the trial court which he asserts lead to legally inconsistent results. The State claims defendant did not ask for a specific finding; a stipulation in the record shows that he did.

The State also asserts that it makes no difference whether the trial court's alternative finding was proper. It argues: "[T]he jury itself appears to have resolved this issue by its unanimous verdict finding the Defendant Guilty". This argument is without merit. In reviewing the trial court's decision on the motion to suppress, the facts reviewed on appeal are the facts before the trial court at the suppression hearing. Further, there is no claim that the motion to suppress was renewed at trial. See Rodriquez v. State, ____ N.M.____, 580 P.2d 126 (1978). Even if it had been, it was not a jury issue.

The reasonableness of a search or seizure is a matter of law to be determined by the trial court. State v. Garcia, 83 N.M. 490, 493 P.2d 975 (Ct.App. 1971); see State v. Whiteshield, 91 N.M. 96, 570 P.2d 927 (Ct.App. 1977). No issue as to the propriety of police seizure of the heroin was presented to the jury by the instructions in this case.

If, as defendant asserts, the alternative finding of the trial court is incorrect, the proper disposition would be a remand to the trial court for a specific finding as to when the heroin fell to the ground. Compare State v. Anaya, 76 N.M. 572, 417 P.2d 58 (1966). We do not remand for a specific finding because the alternative finding is not erroneous.

There is nothing showing probable cause to arrest defendant or probable cause to search defendant's pickup

prior to discovery of the heroin. Thus, there is no basis for applying the automobile exception to the law of search and seizure. State v. Luna, 91 N.M. 560, 577 P.2d 458 (Ct.App. 1978); State v. Barton, (Ct.App.) No. 3212, decided March 14, 1978. Not having been arrested, under defendant's version of facts, until after the heroin was discovered, police activity in connection with the jacket cannot be justified on the basis of a search incident to arrest. See United States v. Chadwick, 433 U.S. 1, 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1977).

The trial court found:

> 15. It is the common practice, when executing heroin searches on premises where there is probable cause to believe heroin is being sold, for officers to "pat down" and examine the people who come on the premises during the search and make inquiries as to their business on the premises. Such persons are commonly asked to exit vehicles to accomplish the "pat down" and questioning.

> This is done because those frequenting premises where heroin is sold are often purchasers of heroin and (a) often carry dangerous weapons, (b) the vehicles may be used for a fast getaway or a weapon, and (c) they will often attempt to dispose of narcotics or other evidence.

The trial court concluded:

> 2. It was not unreasonable for the police officers to search the jacket lying on the front seat of the truck in that it was an article of wearing apparel where weapons or contraband could likely be carried, and which jacket was and would be within easy access by Blea prior to his exiting the truck and while he was being frisked and examined, and upon his reentry into the truck.

The trial court's conclusion is to be sustained in this case because the only evidence as to the nature of the jacket "search" shows that this search was a search for weapons. There was a shaking and a patting of the jacket, then it was discarded. This was consistent with requiring defendant to exit the pickup be-

cause officers could not tell whether defendant was armed while in the pickup. This was also consistent with the frisk of defendant for weapons as soon as he got out of the pickup.

The evidence is uncontradicted that the jacket was within defendant's "grabbing" range once he exited the pickup. Defendant testified that after being frisked and after empyting his pockets, he reached into the pickup for a check stub in order to explain the amount of cash he was carrying. The fact that the jacket, inside the pickup, was within defendant's grabbing range, distinguishes Government of Canal Zone v. Bender, 573 F.2d 1329 (5th Cir. 1978), on which defendant relies. Because the jacket was within defendant's grabbing range, the officer could properly search the jacket for weapons.

Williams v. State, 19 Md.App. 204, 310 A.2d 593 (1973).

The fact that the officers did not have probable cause to believe that this defendant was armed does not make illegal the search of the jacket for weapons. It was sufficient that the officers had probable cause to believe that visitors to the premises were heroin purchasers, and such persons "often" are armed. There was some danger that such a person, detained to preserve the integrity of the search pursuant to warrant, might seek to use a weapon. See United States v. Chadwick, supra. This justifies a weapons search, both of defendant and the jacket within defendant's grabbing range.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

WE CONCUR:

S/ _____ J.
B.C. HERNANDEZ

S/ JOE W. WOOD
Chief Judge

S/ _____ J.
RAMON LOPEZ

IN THE SUPREME COURT
OF THE
STATE OF NEW MEXICO

Wednesday, November 22, 1978

NO. 12,250

DANNY P. BLEA,

Petitioner,

-vs- Original Proceeding on Certiorari

STATE OF NEW MEXICO,

Respondent.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 3669 be and the same is

hereby returned to the Clerk of the Court of Appeals.

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

-vs- NO: 30257 Criminal

DANNY P. BLEA,
ADD: 523 Palo Duro NW,
DOB: 1/27/40
APD PHOTO #: 31-101
SS# 523-50-3254

JUDGMENT, SENTENCE AND
ORDER SUSPENDING SENTENCE

This matter coming on for hearing on May 30, 1978 before the Honorable Gerald R. Cole, District Judge, Plaintiff appearing by James F. Blackmer, Assistant Attorney General, and Defendant appearing personally and by his attorney Vince D'Angelo, the Defendant having been convicted on May 11, 1978 pursuant to a Jury Verdict accepted and

recorded by the Court, of the following crime: Trafficking Heroin, a narcotic drug enumerated in Schedule I, a felony offense occurring on the 20th day of January, 1978.

Defendant is hereby found and adjudged guilty and convicted of said crime, and is sentenced to be imprisoned in the Penitentiary of New Mexico, for the term of not less than ten (10) years nor more than fifty (50) years.

Eight years of the minimum sentence is suspended and Defendant is ordered to be placed on probation for five (5) years after release from imprisonment on this cause, on the following conditions: (1) obey all rules and conditions of the Penitentiary during incarceration, and upon release and during the balance of the five (5) year proba-

tionary period obey all rules, regulations, and orders of the Parole and Probation Authorities, and observe all federal, state and city laws or ordinances.

The terms and conditions of probation are made terms and conditions of the suspended sentence. Defendant shall be given credit for presentence confinement of three (3) days.

S/ GERALD R. COLE
District Judge

Reporter: R. Proctor

APPROVED:

S/ JAMES F. BLACKMER
JAMES F. BLACKMER
Assistant Attorney General

S/ VINCE D'ANGELO
VINCE D'ANGELO
Attorney for Defendant

APPENDIX B

FINDINGS AND CONCLUSIONS

OF TRIAL COURT

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

-vs- 30257-Criminal

DANNY P. BLEA,

Defendant.

COURT'S FINDINGS OF FACT

AND CONCLUSIONS OF LAW

IT IS HEREBY ORDERED that all requested findings of fact and conclusions of law conflicting with those made by the Court are denied.

FINDINGS OF FACT

1. On January 20, 1978, defendant Blea drove his truck onto the premises at 211 Bajo S.W. while police officers

were executing a valid search warrant on these premises.

2. The officers conducting the execution of the warrant had probable cause to believe many of the people who were visiting the premises were purchasing heroin.

3. The truck was driven into the driveway and parked near the rear of the home.

4. As Blea approached the property in his truck, he was in possession of a tinfoil packet containing heroin.

5. When Blea observed persons approaching the truck, he placed the heroin in the sleeve of his jacket, which jacket was lying on the seat next to him.

6. The officers (out of uniform) approached the vehicle, identified themselves as police officers and asked

Blea to step out of the vehicle.

7. He complied and an officer conducted a typical "pat down" search for weapons.

8. He then asked Blea to step to the rear of the truck and inquired as to why he was on the premises. At this time, Blea was within several feet of the front seat of the vehicle.

9. As part of his response, Blea removed items from his pockets.

10. When Blea exited the vehicle, he left the coat lying in the front seat of the vehicle.

11. While Blea was being questioned and before being arrested, a second officer removed the coat from the front seat of the vehicle and searched the jacket.

12. No search was conducted except for the "pat down" of Blea and the search of the jacket.

13. Either when Blea exited the vehicle, or while the officer was searching the jacket, the tinfoil containing the heroin fell to the ground.

14. The tinfoil with the heroin was observed on the ground by a third officer who picked it up, examined it, thought it appeared to be heroin, and Blea was placed under arrest and advised of his rights.

15. It is the common practice, when executing heroin searches on premises where there is probable cause to believe heroin is being sold, for officers to "pat down" and examine the people who come on the premises during the search and make inquiries as to their business on the premises. Such persons are commonly asked to exit vehicles to accomplish the "pat down" and questioning. This is done because those frequenting premises where heroin is sold

are often purchasers of heroin and (a) often carry dangerous weapons, (b) the vehicles may be used for a fast getaway or a weapon, and (c) they will often attempt to dispose of narcotics or other evidence.

16. The police officers had no search warrant for Blea or his truck.

17. At no time did the police officers draw their weapons.

CONCLUSIONS OF LAW

1. It was not unreasonable for the officers to ask Blea to step out of his truck, under the circumstances, in order to minimize the risk that he would use the truck as a weapon and to enable them to minimize any danger he might present were he armed, and to inquire as to the reason for his presence on the premises.

2. It was not unreasonable for the

police officers to search the jacket lying on the front seat of the truck in that it was an article of wearing apparel where weapons or contraband could likely be carried, and which jacket was and would be within easy access by Blea prior to his exiting the truck and while he was being frisked and examined, and upon his re-entry into the truck.

3. There were no violations of Blea's constitutional rights which would justify suppressing the heroin.

S/ GERALD R. COLE
GERALD R. COLE